



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
) ISCR Case No. 19-02355
)
Applicant for Security Clearance)

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: Catie E. Young, Esq.

April 29, 2021

Decision

TUIDER, Robert, Administrative Judge:

Applicant failed to mitigate security concerns regarding Guideline H (drug involvement and substance misuse). Clearance is denied.

Statement of the Case

On June 15, 2015, and June 11, 2018, Applicant submitted Questionnaires for National Security Positions (SF-86). On November 27, 2019, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H. The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

On February 5, 2020, Applicant responded through counsel to the SOR. On July 29, 2020, Department Counsel was ready to proceed. On August 4, 2020, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. On September 23, 2020, DOHA issued a notice of hearing scheduling the hearing for September 29, 2020. The hearing was convened as scheduled. Department Counsel submitted Government Exhibits (GE) 1 through 3, which were admitted without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through F, which were admitted without objection. I held the record open until October 16, 2020, to provide the Applicant with the

opportunity to submit additional evidence. Applicant timely submitted through counsel AE G and H, which were admitted without objection. On October 6, 2020, DOHA received the hearing transcript (Tr.).

Findings of Fact

Applicant's SOR response admitted all of the SOR allegations, and he provided some extenuating and mitigating information. His admissions are accepted as factual findings.

Background Information

Applicant is a 25-year-old electronics engineer, who has been employed full-time by a defense contractor since October 2017. Before becoming a full-time employee, he was employed as a college intern by that defense contractor in the summers of 2015, 2016, and 2017. (Tr. 14-15, 57, 61-62; GE 1, 2)

Applicant graduated from high school in June 2013. He did not complete his college requirements until October 2017, and was awarded a bachelor of science degree in physics in December 2017. (Tr. 15-16; GE 1) Applicant has never married and has no dependents. (Tr. 16-17) He has held a Secret security clearance since July 2015, and has a pending application to upgrade his clearance to Top Secret. Maintaining a clearance is a requirement of his continued employment. (Tr. 17-18, 56)

Drug Involvement and Substance Abuse

In his June 15, 2015 SF-86, Applicant disclosed his marijuana use that spanned a period of time from May 2010 to December 2013. He was introduced to marijuana as a freshman on the high school baseball team, having smoked marijuana about 25 times during his high school years, and "completely stopped" in his senior year. He used marijuana again as a freshman in college "about 3 times." Applicant added in that same SF-86:

I have not done any drugs since my first semester, freshman year, in college. . . . I have done an incredible amount of growing since then, in high school, I stopped spending time with the crowd that I smoked with. . . . the "benefits" of doing any drug is in no way even close to the level of satisfaction that I get from doing my job here at [defense contractor] and the possible benefits that would come later with a security clearance. To jeopardize my future in this industry (and everything that I have worked for) for a couple of hours of "being high is an idiotic choice that I will never make. I will never use this drug, nor any other drug in the future. (GE 2; Tr. 57-60, 74-76)

At the time Applicant completed his June 15, 2015 SF-86, he did not have a security clearance. However, he was subsequently granted access to classified

information with a Secret security clearance in July 2015. (SOR; Tr. 60) Applicant took and passed a drug test when he began working in June 2015. (Tr. 60)

In his June 11, 2018 SF-86, which Applicant completed when he sought to upgrade his clearance from Secret to Top Secret, he disclosed additional drug use. It was these disclosures that formed the basis for the majority of security concerns alleged in Applicant's SOR. He admitted using marijuana intermittently from May 2010 to May 2018 "around a hundred" times, which included his admitted marijuana use in his June 15, 2015 SF-86. Additionally, he admitted using cocaine from April 2016 to March 2017 five to six times; using MDMA from December 2016 to April 2018 six times; using lysergic acid diethylamide (LSD) in August 2017 one time; using prescription medication Hydrocodone without a prescription in March 2017 three times; and using prescription medication Adderall without a prescription from April 2017 to April 2018 four times. As noted, Applicant previously admitted using marijuana; however, he continued using marijuana after being granted access to classified information in July 2015 as well cocaine, Ecstasy or MDMA, LSD, prescription medication Hydrocodone, and prescription medication Adderall. (SOR ¶¶ 1.a – 1.f; Tr. 69-70)

Applicant's admitted drug use in his June 11, 2018 SF-86 is consistent with his previous admitted drug use in his June 15, 2015 SF-86, and subsequent drug use he described in his March 12, 2019 Office of Personnel Management Personal Subject Interview (OPM PSI), his SOR Answer; and during his hearing testimony. (GE 2, GE 3; SOR Answer; Tr. 24-48, 60-65, 67-68, 72-73) Applicant disclosed his drug use on his June 11, 2018 SF-86 to avoid being "vulnerable for blackmail." (Tr. 72)

When queried by Department Counsel why he did not cease drug use after becoming a full-time employee, Applicant stated:

I think I was still immature. Coming out of college doesn't just – there's not just a slick straight graduate and all of a sudden you're a fully-developed grown man. There are things that happen along the way that shape your character. And unfortunately for me, I was somewhat sheltered, so I didn't get to experience anything – any real negative effects until later on. And I'm sorry that it happened too late, but up until that point, that's – that's – I didn't get any experience. That was – I formed that maturity in my head later. (Tr. 65-66, 76)

Applicant stated that he stopped using all drugs in May 2018. His marijuana use up until that point was averaging, ". . . two to three times a week, so it wasn't irregular for me to come home and smoke on my balcony. And this day was similar to what I'd been doing the last year or so. I smoked. And then an hour or so later, I got a phone call from my mom. I decided I didn't want to talk to her 'cause I was high at the time. And just thought, you know, I'll deal with it tomorrow." (Tr. 29-31) Applicant's mother left him a voice mail telling him that his grandmother was hospitalized and she needed to talk to him. He later realized other people were counting on him and that he needed to grow up and could not be "an irresponsible college kid anymore." (Tr. 31-32, 34, 41, 68-71)

Applicant acknowledged that his drug use was illegal and such use was prohibited under federal regulations. (Tr. 32-34, 71)

Applicant's family and friends are aware of his past drug use and are supportive of him remaining drug-free. He stated that he would remove himself from any situation where drug use was present. (Tr. 34-35, 50-51) Applicant submitted a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility. (Tr. 48; AE A) To demonstrate his drug-free status, Applicant submitted two negative hair follicle drug tests dated January 24, 2020 and October 1, 2020, and stated that he would be willing to take random drug tests in the future. (Tr. 48-50; AE B, AE G) Applicant has never been arrested, charged, or convicted for a drug-related offense. He has not participated in any voluntary or court-ordered drug rehabilitation programs. Applicant accepted responsibility for his past drug abuse, expressed remorse, and stated that he has no desire or intention to use drugs in the future. (Tr. 49, 51-53)

Character Evidence

Applicant submitted five reference letters from a cross section of individuals to include a company senior manager, a company staff engineer, a coworker, his sister, and a long-time friend. His senior manager described his work ethic, integrity, trustworthiness, and the significant contribution he makes towards the nation's defense. Applicant's coworker provided a similar favorable endorsement. Applicant's sister and long-time friend provided favorable character assessments supported by accounts of their past personal interactions with him. All five letters are supportive of granting Applicant access to classified information. (AE C, AE H)

Applicant also provided numerous awards that he received from 2017 to 2020 and his performance appraisals for 2019, 2018, and 2016 as well as his current resume. Applicant's appraisals identify him as a top-shelf performer, who is a valued and trusted company employee. (AE D, AE E; AE F) Applicant discussed his accomplishments, which are further documented in his performance appraisals and awards. (Tr. 19-24) Apart from work, which lately has been at home, he spends his free time biking, rock climbing, watching sports, and playing video games. Applicant leads a healthy lifestyle that is not consistent with drug use. (Tr. 54)

Policies

This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on June 8, 2017.

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially

disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Drug Involvement and Substance Misuse

AG ¶ 24 describes the security concern concerning drug involvement and substance misuse:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances

that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any "controlled substance" as defined in 21 U.S.C. 802. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above.

Two drug involvement disqualifying conditions in AG ¶¶ 25(a) and 25(f) could raise a security concern and may be disqualifying in this case: "any substance misuse (see above definition);" and "any illegal drug use while granted access to classified information or holding a sensitive position." These proceedings were initiated after Applicant self-reported his history of drug involvement and substance misuse on his June 15, 2015 SF-86, on his June 11, 2018 SF-86, and in his March 12, 2019 OPM PSI. All of his drug use was affirmed in his SOR Answer, and in his hearing testimony. Consideration of the applicability of mitigating conditions is required.

AG ¶ 26 provides four potentially applicable drug involvement mitigating conditions:

(a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including but not limited to:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used; and

(3) providing a signed statement of intent to abstain from all involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

AG ¶ 26(a) can mitigate security concerns when drug offenses are not recent. There are no “bright line” rules for determining when such conduct is “recent.” The determination must be based “on a careful evaluation of the totality of the record within the parameters set by the directive.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant’s last use of marijuana occurring approximately 17 months before the hearing was not recent. If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge’s decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. For the recency analysis the Appeal Board stated:

Compare ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) *with* ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) (“The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.”) (citation format made).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, affirmed the administrative judge’s decision to revoke an applicant’s security clearance after considering the recency analysis of an administrative judge stating:

The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

See also ISCR Case No. 02-10454 (App. Bd. Nov. 23, 2004) (sustaining denial of security clearance for Applicant who used marijuana five times while holding a security clearance with four years between most recent marijuana use and hearing).

The passage of time after ending drug use is not considered in isolation. Applicant's drug use, to include marijuana, cocaine, MDMA, LSD, prescription medication Hydrocodone, and prescription medication Adderall use after completing his June 15, 2015, SF-86, being granted a security clearance in July 2015, and starting work full-time in June 2017 is more significant in this case. See ISCR Case No. 06-18270 at 3 (App. Bd. Nov. 7, 2007) (marijuana use after completing an SF-86 "undercuts" favorable application of the drug involvement recency mitigating condition).

Applicant acknowledged that he used marijuana intermittently from May 2010 to May 2018 about 100 times, used cocaine from April 2016 to March 2017 five to six times, used MDMA from December 2016 to April 2018 six times, used LSD in August 2017 one time, used prescription medication Hydrocodone in March 2017 three times, and used prescription medication Adderall from April 2017 to April 2018 four times. Applicant's drug use continued after assuring adjudication officials that he would not use drugs again when he completed his June 15, 2015 SF-86, after he was granted a Secret security clearance in July 2015, and after he became a full-time employee in July 2017.

Applicant recognized the adverse impact on his life of drug abuse in connection with access to classified information. I accept Applicant's statements in his SF-86s, to the OPM investigator, in his SOR response, and at his hearing as credible, and he sincerely intended to abstain from future drug possession and use. AG ¶ 26(a) applies in part to his illegal-drug-related conduct because it is not particularly recent. However, the continued use of marijuana and a variety of other illegal drugs while holding a security clearance and becoming a full-time employee post-college shows a profound lack of judgment. More time without drug use is necessary to assure that drug use is unlikely to recur and does not cast doubt on his current reliability, trustworthiness, or good judgment.

Applicant demonstrated his intent not to abuse illegal drugs in the future. He has not used illegal drugs since May 2018, approximately two years and four months before his hearing, he has disassociated from drug-using associates and contacts, he has avoided the environment where drugs were used, and he has provided a signed statement of intent to abstain from all involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility. AG ¶ 26(b) applies. AG ¶¶ 26(c) and 26(d) are not applicable under the facts of this case.

In conclusion, Applicant possessed and used a variety of drugs on multiple occasions from May 2010 to May 2018. He continued to use marijuana and used a variety of other drugs after being granted a security clearance in July 2015. The motivations to stop using illegal drugs are evident. He understands the adverse consequences from illegal drugs. Approval of a security clearance, potential criminal liability for possession of drugs and adverse health, employment, and personal effects resulting from drug use are among the strong motivations for remaining drug free. More time must elapse without any drug use to demonstrate a sufficient track record of no

drug abuse to establish rehabilitation and eliminate drug involvement as a bar to his access to classified information.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guideline H in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

The factors supporting continuation of Applicant's national security eligibility are significant; however, they are insufficient at present. He was forthright and candid in his SF-86s, in his OPM interview, in his responses to DOHA interrogatories, in his SOR response, and at his hearing about his drug use. Applicant achieved some important education and employment goals, demonstrating his self-discipline, responsibility, and dedication. He served successfully as a summer intern during the summers of 2015, 2016, and 2017 until being granted full-time status in October 2017 with a defense contractor. His supervisors laud his contributions to the defense contractor and note his extraordinary potential. By all accounts, he is an honest, caring, diligent, intelligent, and responsible person. He disclosed his drug use to his family and supervisors. His supervisors are very supportive of his continued employment. There is no evidence of any security violations since being granted a security clearance in July 2015. Applicant understands why his drug possession and use was improper, and he does not intend to use illegal drugs in the future.

The rationale for revoking Applicant's clearance is more substantial. His decisions to possess and use illegal drugs after completing his June 15, 2015 SF-86 and being granted a Secret security clearance in July 2015, and after becoming a full-time employee in October 2017 were imprudent, irresponsible, reckless, and improper. Not only did his marijuana use continue after being granted a clearance, but he expanded his illegal drug use to include cocaine, MDMA, LSD, Hydrocodone, and

Adderall. He did not complete a drug rehabilitation or counseling program. He has refrained from using a variety of drugs for two years and four months. His drug use “raises questions about [his] ability or willingness to comply with laws, rules, and regulations.” AG ¶ 24. More time without illegal drug use is necessary to credit him with being fully rehabilitated and to entrust him with access to classified information.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude drug involvement and substance misuse concerns are not mitigated. For the reasons stated, Applicant is not eligible for access to classified information at this time.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H: AGAINST APPLICANT

Subparagraphs 1.a – 1.f: Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant eligibility for a security clearance. National security eligibility for access to classified information is denied.

Robert Tuidier
Administrative Judge